



U.S. Citizenship
and Immigration
Services

FILE:

Office: LOS ANGELES DISTRICT OFFICE Date:

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, CA. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for further action consistent with this decision.

The record reflects that the applicant is a 26-year-old native and citizen of Mexico. The applicant was found inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, Grand Theft (Vehicle) in violation of section 487h of the California Penal Code (as it existed on July 4, 1996).¹ The record reflects that the applicant is the son of a naturalized U.S. citizen father, [REDACTED]. The applicant last entered the United States in 1989.

The District Director found that the applicant had failed to establish extreme hardship to his U.S. citizen father. The application was denied accordingly.

On appeal, counsel contests the inadmissibility determination, asserting that the applicant has never been formally charged with or convicted of a crime. Counsel contends that the determination of extreme hardship is therefore not required and immaterial. In support of this contention, counsel submits a brief, birth certificates, and earnings statements for the applicant. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A)(i)(I) of the INA states:

(A) Conviction of certain crimes.—

(i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such crime . . . is inadmissible.

8 U.S.C. § 1182(a)(2)(A)(i)(I). The record does not reflect that the applicant has admitted to the commission of any crime, or the commission of acts that constitute the elements of a criminal offense. Counsel's brief asserts that the applicant was not arrested for Grand Theft (Vehicle) in violation of section 487h of the California Penal Code but, rather, suspicion of violating section 459, Burglary. Counsel contends that the applicant "was not detained on bond nor arraigned in this matter, [and] he was not required to defend the action." *Counsel's Brief In Support of Appeal from Denial of I-601*, at 2. Therefore, the AAO has examined the record for evidence of the conviction on which the inadmissibility determination was based.

The AAO notes that the record reflects that the District Director did not specifically inform the applicant and his counsel of the dates of arrest and conviction or the case number of the Grand Theft (Vehicle) conviction on which the finding of inadmissibility was based. *See Decision of the District Director* (October 24, 2003), *Second Letter of District Director Regarding Application for Waiver of Inadmissibility* (August 19, 2003), *First Letter of District Director Regarding Application for Waiver of Inadmissibility* (February 5, 1999). The

¹ This particular section of the California Penal Code has since been repealed. West's Ann.Cal.Pen.Code § 487h (repealed by Stats. 1994, c. 1263 (A.B. 1328) § 4, operative January 4, 1997.)

denial states, "you were convicted of a violation of section 487H(A) of the Penal Code of California, Grand Theft Vehicle, a felony. Therefore, you are inadmissible under Section 212(a)(2)(i)(I) of the Act . . .". *Decision of the District Director, supra*, at 2.

A Federal Bureau of Investigation ("FBI") Record of Arrest and Prosecution ("RAP sheet"), dated June 18, 1998, is in the file. The RAP sheet was apparently obtained in connection with the submission of the applicant's fingerprints to the former Immigration and Naturalization Service as part of a background check to determine his eligibility for adjustment of status to that of lawful permanent resident. The FBI result returned on June 18, 1998 indicated that the FBI had a record matching the applicant's fingerprints. The FBI control number associated with the FBI result matches the FBI control number displayed on the RAP sheet in the record. The RAP sheet shows a single arrest, on July 4, 1996, by the Sheriff's Office in Norwalk, California, for which the agency case number is [REDACTED] and the charges are "Robbery-F" and "Burglary." There are no further arrests, events, or limitations reflected on the RAP sheet. The AAO notes that there is also a subsequent FBI result in the file, dated December 29, 2002, indicating that the FBI found no records matching the applicant's fingerprints.

The applicant's birth certificate shows his true name to be "Jeronimo Guardado Lujan," born on September 30, 1977. *Birth Certificate, United States of Mexico* (birth registered October 18, 1977). The date of birth listed on the RAP sheet as matching the applicant's fingerprints in FBI records is September 30, 1978. Applicant's claimed date of birth on the application for waiver and on the copy of his birth certificate is September 30, 1977. The name in FBI records matching the applicant's fingerprints is [REDACTED]. The applicant's claimed name on the application is [REDACTED]. The birthplace cited by the FBI is Mexico, the applicant's place of birth.

Police records from the sheriff corresponding to the July 4, 1996 arrest indicate that charges were not pressed against the applicant, who is named in the report as "SJ-3" (subject juvenile number three), [REDACTED] with a date of birth September 30, 1978. *County of Los Angeles-Sheriff's Department-Supplementary Report* at 3 (July 24, 1996) (stating, "Charges will not be sought against the remaining five juveniles due to lack of sufficient evidence.") The allegations narrated in the report describe a break-in to a vehicle and theft of several items from the car. *Id.* The report contains no allegations that the vehicle in question was stolen or that an attempt was made to steal the vehicle. *Id.* There is further no reference to section 487h of the California Penal Code. The case was cleared as "solved," with the closure report notated with a District Attorney "reject" as to charges against the applicant and other juveniles arrested in connection with the case.² *County of Los Angeles Case Closure Report* (July 24, 1996). There is no indication in the record that any further action was taken with respect to these charges, or the underlying events leading to the arrest.

The record also contains certified copies of computer printout records of the Superior Court of Los Angeles, Southeast Superior Judicial County of Los Angeles, State of California, dated September 30, 1998. The records pertain to the criminal history of a defendant identified in the record as [REDACTED] date of birth September 30, 1976. For the first arrest in the records, the case number is [REDACTED] for which the information was filed with the court on July 3, 1995. The addresses listed for the defendant include [REDACTED] Paramount, CA 90703, [REDACTED] Paramount, CA 90723. The defendant

² According to his birth certificate, the applicant was in fact over the age of 18 at the time of the arrest. The AAO notes that the purported status of the applicant as a juvenile appears unrelated to the reasons for failure to bring formal charges against the applicant.

is identified as being 5'7", 140 pounds, with brown eyes and black hair.³ The multiple addresses of the applicant in Simi Valley, North Hollywood, do not include those ascribed to the defendant in these court records. There were two counts in the information filed under case [REDACTED]. The disposition of the first charge, Grand Theft Vehicle, under section 487h of the California Penal Code, was a guilty plea, and a sentence of 16 months of imprisonment, minus a total of 46 days of credit of time served and "good time/work time." The disposition of the second charge, Evade Police-Reckless Driving, under section [REDACTED] of the California Penal Code, was a dismissal pursuant to plea agreement. The defendant was also ordered to pay \$200.00 restitution. Another complaint was filed against this defendant in 1998, for unlawful possession of a firearm by a felon, in violation of California Penal Code 12021(a)(1), case number [REDACTED]. The defendant in the case was remanded to custody, with bail set at \$30,000. There is no final disposition of this case in the record.

Documentation submitted in support of the applicant includes a copy of a certified criminal records check, showing no records between the years 1985 and 1998 for [REDACTED] dates of birth September 30 of 1977 and 1978. *Letter of John A. Clarke, Executive Officer/Clerk of the Court, Superior Court, Los Angeles County, California* (September 21, 1998). The Los Angeles County Sheriff's Department also produced a clearance letter, showing no records on file for Jeronimo Guardado-Lujan, date of birth September 30, 1977. There is no indication in the record of California's rules regarding the retention of juvenile arrest records for which there was no conviction.

The AAO notes that, with a sentence of 16 months given on July 3, 1995, even with 46 credited days served, it appears that the defendant would have been incarcerated on the date of the applicant's arrest and fingerprinting on July 4, 1996. However, there is no evidence in the file to substantiate whether the defendant served the entire sentence, and it is possible that, with early release, the defendant was at large. Nevertheless, the question arises as to why the serious crimes for which the defendant in cases VA32660 and TA050232 was charged and, in at least one instance, convicted, do not appear on the applicant's RAP sheet. Additionally, there is a question of why the California Sheriff's office did not discover the prior 1995 adult conviction record when the applicant was fingerprinted in connection with his arrest on July 4, 1996.

In summary, the record reflects that the applicant's *fingerprints* were connected to a single arrest in 1996, the disposition of which was a failure to file criminal charges. The records of the additional offenses that the District Director concluded were committed by the applicant appear to be connected to the applicant through means of comparing *biographic data*, rather than fingerprints or other biometric identification. Despite the somewhat similar biographical data, and the complication introduced by the applicant's own misrepresentation of his name and date of birth during his 1996 arrest, the records relating to crimes apparently committed by [REDACTED] have not been sufficiently tied to this applicant.

Because the record is inconclusive and the AAO is not in a position to conduct further investigation as to whether the conviction at issue pertains to the applicant, the AAO finds it necessary to remand the present matter to the director for a new decision in the applicant's case. If the new decision is adverse to the applicant, the decision shall be certified to the AAO for review.

ORDER: The director's decision is withdrawn and the matter remanded to the director for further action consistent with the present decision.

³ The applicant is identified in other records as being 5'6", 130 pounds, with brown eyes and black hair. *Complaint Arrest Report, Continuation* at 3 (July 4, 1996).